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COMMENTS OF GOVERNMENTS ON THE REPORT OF THE WORKING GROUP ON A DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT

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INTRODUCTION

1. At its forty-fifth session, in 1993, the International Law Commission decided that the draft articles proposed by the Working Group on a draft statute for an international criminal court 1/ should be transmitted, through the Secretary-General, to Governments, with a request that their comments be submitted to the Secretary-General by 15 February 1994. 2/

2. Pursuant to that request, the Secretary-General addressed to Governments a note verbale dated 6 October 1993 inviting them to submit written comments on the draft articles by 15 February 1994.

3. Furthermore, the General Assembly, at its forty-eighth session, adopted resolution 48/31 of 9 December 1993 entitled "Report of the International Law Commission on the work of its forty-fifth session", paragraphs 5 and 6 of which read as follows:

> ["The General Assembly,]
>
> "5. Invites States to submit to the Secretary-General by 15 February 1994, as requested by the International Law Commission, written comments on the draft articles proposed by the Working Group on a draft statute for an international criminal court;
>
> "6. Requests the International Law Commission to continue its work as a matter of priority on this question with a view to elaborating a draft statute, if possible at its forty-sixth session in 1994, taking into account the views expressed during the debate in the Sixth Committee as well as any written comments received from States".

4. Pursuant to paragraph 5 of resolution 48/31, the Secretary-General addressed a note verbale to Governments dated 4 January 1994, inviting them again to submit their written comments by 15 February 1994.

5. The replies from Member States which had been received as of 18 February 1994 appear in the present document. Replies which might still be forthcoming will be included in addenda to the present document.

Notes

1/ Official Records of the General Assembly, Forty-eighth Session, Supplement No. 10 (A/48/10), annex, sect. B.

2/ Ibid., para. 100.

COMMENTS RECEIVED FROM MEMBER STATES

ALGERIA

[Original: French]

[14 February 1994]

1. Before making some comments on specific aspects of the draft statute for an international criminal court proposed by the Working Group of the International Law Commission, the Algerian Government wishes to recall, for fear that it may have been forgotten to some extent, the historical, logical and legal context in which the question is being considered.

A. Context in which the question is being considered

2. The establishment of an international criminal jurisdiction can hardly be separated from the main question, that of the elaboration of a draft code of crimes against the peace and security of mankind. Historically, the establishment of an international criminal jurisdiction has been envisaged in order to meet the need for a judicial body which would implement such a code. This choice stemmed from well-founded considerations which retain their full relevance and timeliness. While it is true that without a judicial body responsible for implementing and enforcing it, a code would be superfluous, it is also true that without a prior strict definition of the applicable law, a court would be merely an ineffectual body. What is involved here are two inseparable and complementary aspects of a single undertaking, namely, the punishment of crimes which, because they are singularly abhorrent and shocking to the world's conscience, cannot but be characterized as crimes against the peace and security of mankind.

3. The Algerian Government, which has continually declared its support for the establishment of an international criminal court, is all the more comfortable in stating that the establishment of such a court is not an end in itself. It has real meaning and scope only if this court is intended to punish acts which the international community agrees to recognize as crimes against the peace and security of mankind, and which it characterizes as such and as belonging to the jurisdiction whose establishment is envisaged.

4. Hence, the fact that the International Law Commission was given a mandate, in paragraph 6 of General Assembly resolution 47/33, of 25 November 1992, to undertake the project for the elaboration of a draft statute for an international criminal court does not in any way mean that work on the draft Code of Crimes against the Peace and Security of Mankind should be dropped or even slowed down. As the draft Code has been adopted by the Commission on first reading, it would be highly desirable for the Commission to resume consideration of it in accordance with its usual working methods, for this draft remains the foundation on which an international criminal jurisdiction would be built. A twofold operation is called for, and both aspects of the question should be worked on concurrently, with the same degree of interest and diligence. The

ripeness of the topic and the present concerns of the international community provide conditions conducive to substantial and fairly rapid progress in both directions.

B. Comments on the draft articles

1. The nature of the future court

5. With regard to the nature of the court, the only option, in the Algerian Government's view, is a permanent court. Algeria cannot share the opinion that an embryonic structure that would meet sporadically, on an ad hoc basis, could be acceptable. The supporters of such an approach mainly raise considerations of a budgetary nature which, regardless of their importance, cannot be decisive in and of themselves, in view of the stakes involved. Recent international events have harshly revealed a lacuna in the structure of international relations: the absence of an international criminal court whose sole existence would probably have helped to defuse serious crisis situations. Clearly, what we have here is a legal vacuum which should be filled as soon as possible. One-shot solutions may have been found in some cases, especially through recourse to ad hoc bodies, but these are mere stopgap measures which one cannot make do with indefinitely or adapt as one pleases without a serious risk of dissipation of efforts and fragmentation of the international judicial system.

6. Furthermore, a permanent international criminal jurisdiction would have the advantage of ensuring an objective, uniform and impartial application of international law, while avoiding the hazards inherent in the establishment of jurisdictions following the occurrence of the reprehensible acts which are to be brought before them.

7. Lastly, only permanent international judges are in a position to place themselves above momentary political contingencies and the inevitable pressures linked to the sensitivity of the cases to be tried. An equal, independent and impartial justice can be ensured only by a permanent court composed of magistrates elected in order to try, with full awareness and in conformity with general and impersonal legal norms, the cases referred to them.

2. The competence of the future court

8. With regard to the competence of the court, the Algerian Government shares the generally accepted view that the competence *ratione personae* should be limited to individuals. On the other hand, the competence *ratione materiae* seems unduly restrictive in the draft statute, in that none of the three alternatives proposed in article 23 meets the need to confer on the court sufficient authority, an authority commensurate with the task for which it is to be established. In Algeria's view, when a State accepts the court's statute, it should, *ipso facto*, accept the court's competence in regard to all the crimes identified as belonging to its jurisdiction. Any other solution would, in practice, be tantamount to calling into question the value of a State's very acceptance of the court's statute and making such acceptance meaningless.

3. Applicable law

9. With regard to applicable law (a follow-up to the preceding question), the draft statute proposes a formula which deserves to be reviewed and supplemented. Article 22 lists a number of crimes in respect of which the court may have jurisdiction on the basis of international conventions in force. This approach raises a number of questions, including that of the compatibility between the provisions of the court's statute and the provisions of these conventions with regard to the application of the "try or extradite" principle, which is the basic principle of the aforesaid conventions. A logical application of this principle, as it has been codified in these conventions, might result, in either scenario, in the practical impossibility of bringing a case before the court, inasmuch as States, even under their treaty obligations, are bound only to try the suspects or to extradite them to another country. An attempt has been made in the draft statute to go beyond this basic contradiction by establishing a kind of preferential jurisdiction for the court, but making this dependent solely on the good will of States. From this standpoint, the very usefulness of an international criminal court is called into question, for it can be anticipated that preference for the national jurisdiction would quite often prevail.

10. Moreover, the list of crimes in article 22, even as supplemented by the provisions of article 26, is far from being exhaustive or satisfactory. It does not include a whole series of crimes (e.g. international terrorism) though they are widely accepted by the international community, and by the Commission itself, as crimes against the peace and security of mankind.

11. In view of the foregoing, the only consistent approach which seems conceivable would be to establish exclusive jurisdiction for the court in respect of a number of crimes against the peace and security of mankind as previously identified in a universal code binding on all States.

4. Relationship to the United Nations

12. The question of the relationship between the future court and the United Nations has not received as much attention as it deserves, despite the fundamental importance attached to it in paragraph 60 of the report. The Algerian Government believes that it is important for the court to be a United Nations body, not only in order to confer on it the moral authority of the Organization and to ensure its universal recognition, but also to give material expression to the indivisibility of international law and order. This would not in any way affect the court's independence and autonomy. The Statute of the International Court of Justice provides a cogent example with regard to the method of election of judges, their status, the automatic acceptance of the Statute of the Court by every Member of the United Nations, and the means by which cases are brought before the Court.

AUSTRALIA

[Original: English]

[16 February 1994]

The Working Group draft is divided into seven parts and the following comments will deal with each Part in turn.

PART 1: ESTABLISHMENT AND COMPOSITION OF THE TRIBUNAL

A number of articles in this part raise issues of particular importance.

Draft article 2. Relationship of the Tribunal to the United Nations

Draft article 2 contains two alternative texts in square brackets. The first states that the Tribunal is to be "a judicial organ of the United Nations". The second provides that the Tribunal is to be "linked with the United Nations as provided for in the present Statute".

The Working Group's commentary on draft article 2 notes that there was disagreement among its members on what type of relationship the Tribunal should have with the United Nations. Australia believes that the international criminal tribunal should be part of the United Nations system, preferably as a subsidiary judicial organ. Australia believes this could be achieved pursuant to article 7 (2) of the Charter of the United Nations. At the very least, Australia believes that the tribunal should be linked with the United Nations by an agreement analogous to those concluded with specialized agencies.

Draft article 4. Status of the Tribunal

Draft article 4.1 provides that the Tribunal is to be "a permanent institution ... [which will] sit when required to consider a case submitted to it." This approach accords with the view Australia expressed in its interventions on this issue in the Sixth Committee in 1992 and 1993 and in its written comments on the 1992 Working Group report (see A/CN.4/452).

Draft article 5. Organs of the Tribunal

Draft article 5 establishes the three organs of the Tribunal: (a) the court; (b) the registry; and (c) the procuracy. This structure is appropriate and identical to that employed for the international tribunal for crimes in the former Yugoslavia.

Draft article 9. Independence of judges

Adherence to this principle is vital to the proper functioning of the tribunal. The Working Group may wish to list in draft article 9 examples of activities which would interfere with the "judicial functions" of judges or "affect confidence in their independence". For example, the commentary on draft article 9 notes that "it was clearly understood that a judge of the Court could

not be, at the same time, a member or official of the Executive Branch of Government."

Draft article 11. Disqualification of judges

The Working Group's commentary on this article notes that it would welcome comments from the General Assembly on "whether a limit should be placed on the number of judges whose disqualification an accused could request". Setting a limit should not be necessary as it is unlikely that an accused could make out the grounds necessary for disqualifying more than one or two judges. Establishing a limit may also be seen as prejudicing the right of an accused to a fair trial before an impartial court.

The Working Group also requested comments as to the quorum required in the event that a judge be disqualified. Australia believes that, whether this disqualification occurs pursuant to article 11.2 or 11.3, a replacement should be provided so that the original quorum is maintained.

Draft article 13. Composition, functions and powers of the Procuracy

Draft article 13.2 provides for States parties to nominate candidates for election as prosecutor and deputy prosecutor. Unlike draft article 7.2 which limits States parties to nominating one candidate for election as a judge of the court, draft article 13.2 places no such limitation on States parties in relation to nominating candidates for prosecutor and the deputy prosecutor. It would be best also to limit States parties to nominating one candidate each for prosecutor and deputy prosecutor with the requirement that the candidates put forward would have to be of different nationality.

Draft article 13.4 states that the procuracy is to act independently. Australia's written comments on the 1992 Working Group report expressed support (at para. 59) for an independent prosecutorial system rather than the complainant State conducting prosecutions.

Draft article 15. Loss of office

Draft article 15 establishes the mechanism by which judges, the prosecutor, deputy prosecutor and registrar can be removed from office for misconduct or serious breach of the statute. In particular, draft article 15.2 provides that the prosecutor and deputy prosecutor can be removed by decision of two thirds of the Court. Australia believes that empowering the Court to dismiss the prosecutor or deputy prosecutor threatens the independence of the procuracy and might lead to accusations of bias. A more suitable mechanism would be for the States parties to decide the question of whether the prosecutor or deputy prosecutor should be removed in any particular case.

Draft articles 19 and 20. Rules of the Tribunal

These provisions are akin to article 15 of the Statute of the international tribunal for crimes in the former Yugoslavia, which calls for the judges of that Tribunal to adopt rules of evidence and procedure. Security Council resolution 827 (1993), by which the Security Council adopted the statute of the

international tribunal for crimes in the former Yugoslavia also called on States to provide comments on the rules of procedure and evidence of that Tribunal which would be submitted to the judges for their consideration. It would be appropriate to consider whether a similar mechanism could be created to allow States parties the opportunity to have an input into the making of the rules of procedure and evidence for the international criminal tribunal.

Draft article 21. Review of the statute

Such a provision would be best placed with the final clauses of the statute. It provides for a review after five years at the request of an unspecified number of States parties. It will be difficult to set the number of States parties necessary to request a review, as the total number of States parties after five years will be hard to predict. Perhaps a better approach would be to set a fraction of States parties as the required number, e.g. one third or one quarter. It may also be appropriate to allow for subsequent reviews of the statute.

PART 2: JURISDICTION AND APPLICABLE LAW

These provisions lie at the heart of the statute.

These draft articles represent an expanded view of what should constitute the subject-matter jurisdiction of the court. In its 1992 report, the Working Group (at para. 449) argued that "the Court's jurisdiction should extend to specified existing international treaties creating crimes of an international character." It expressed the view (at para. 451) that "at the first stage of the establishment of a court, its jurisdiction should be limited to crimes defined by treaties in force." In its intervention during debate on this issue in the Sixth Committee at the forty-seventh session of the General Assembly, Australia noted its general support for this approach of the Working Group in dealing with the subject-matter jurisdiction of a court.

The present draft articles now propose that the subject-matter jurisdiction of the court reach beyond treaties in force to crimes under general international law, certain crimes under national law which give effect to crime suppression conventions (e.g. the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances) and crimes referred to the court by the Security Council in certain cases. This represents a considerable change of attitude.

Draft article 22. List of crimes defined by treaties

Draft article 22 lists those crimes defined by certain treaties which are intended to form the basis of the court's jurisdiction. The following criteria for inclusion in the list are given in the Working Group's commentary on draft article 22:

> "(a) The fact that the crimes are themselves defined by the treaty concerned in such a way that an international criminal court could apply a basic treaty law in relation to the crime dealt with in the treaty;

"(b) The fact that the treaty created, with regard to the crime therein defined, either a system of universal jurisdiction based on the principle aut dedere aut judicare or the possibility that an international criminal tribunal try the crime, or both."

These criteria represent a filter for determining which crimes and treaties should be included in draft article 22. Because they adequately describe the elements of the crime and establish the principle of aut dedere aut judicare or universal jurisdiction, they largely meet the concerns expressed by Australia at paragraph 37 of its written comments on the 1992 Working Group Report that:

"Consideration will need to be given as to how specific offences which constitute a serious crime of an international character are to be deduced from the wide range of penal norms created by existing conventions. The elements of the criteria by which certain conduct defined in existing conventions would come within the jurisdiction of a court will need to be identified."

As noted in its statement to the Sixth Committee at the forty-eighth session of the General Assembly, Australia believes that article 22 should not constitute an exhaustive list, and should allow for future expansion. We note that, at present, no general procedure has been established in any other part of the draft which would allow for future treaties to be included. This possibility should be explored. There seems no reason in principle to limit the court's jurisdiction in this regard to only those treaties currently included in the list.

One point remains unclear in relation to this draft article. This is whether it is intended that the court can have jurisdiction over the list of offences contained in the draft article on the basis that these are "international crimes" as defined by the various conventions (in which case the court's jurisdiction would not depend on a State being a party to the relevant treaty), or whether it is intended that the court will only have jurisdiction in the event that jurisdiction is conferred upon it by a State which is a party to a particular convention. Draft article 23 suggests that the former is the proper interpretation, but draft article 24 suggests that the latter is the proper interpretation.

Moreover, the interrelationship between draft articles 22, 23 and 24 is crucial but not clear, as currently drafted. Unless clarified, the precise jurisdiction of the court will remain difficult to ascertain and may well lead to challenges to the jurisdictional competence of the court in individual cases.

Draft article 23. Acceptance by States of jurisdiction over crimes listed in article 22

Draft article 23 is intended to provide the mechanism by which States can accept the jurisdiction of the Court over crimes listed in draft article 22. It lists three alternative approaches: alternative A, providing for States parties to opt in to the jurisdiction of the court; alternative B, requiring States parties to opt out of the Court's jurisdiction; and alternative C, providing for a modified version of opting in to the jurisdiction. In its commentary, the

Working Group has sought guidance from the General Assembly as to the system to be adopted.

In its comments on the 1992 Working Group report, Australia noted the importance of the Court having a voluntary jurisdiction whereby a State could become a party to the statute and by separate act accept the jurisdiction of the court. An opting-in mechanism would encourage greater participation in the statute. Alternatives A and C would facilitate this opting-in approach.

Draft article 24. Jurisdiction of the Court in relation to article 22

Australia agrees with the underlying principle of the present draft article in so far as it takes account of the competing jurisdictional claims of States parties. In considering the Court's jurisdiction, Australia agrees that, for practical reasons, the emphasis should be placed on the State in whose territory the accused is found or which otherwise can establish jurisdiction under the relevant treaty.

Australia is unclear as to the proposed scope of draft article 24.2. Is it intended to give the court jurisdiction in situations where the suspect is located in a State which is not a party to the relevant treaty? As noted above, in our comments on draft article 22, it is unclear whether the court can have jurisdiction only in those cases in which such jurisdiction has been conferred by a State which is a party to the relevant treaty.

Draft article 25. Cases referred to the Court by the Security Council

Australia has no objection in principle to the idea of the Security Council being able to refer complaints to the court. However, as currently drafted, the Security Council would have far greater powers in this regard than any individual State. On its face draft article 25 seemingly allows the court to hear cases submitted to it by the Security Council regardless of whether the requirements in draft article 24 have been met. If this is intended to be the case, it should be clear in the text of the draft article.

Draft article 26. Special acceptance of jurisdiction by States in cases not covered by article 22

Australia supports the principle expressed in this draft article, as noted in Australia's statement to the Sixth Committee at the forty-eighth session of the General Assembly.

PART 3: INVESTIGATION AND COMMENCEMENT OF PROSECUTION

Draft article 29. Complaint

This draft article accords with the view put forward by Australia in its written comments on paragraph 514 of the 1992 Working Group report that the power of complaint to the tribunal should extend to any State party which has accepted the jurisdiction of the court with respect to the offence in question.

Australia is uncertain, however, as to which States are covered by inclusion in the present draft of the sentence "or other State with such jurisdiction and which has accepted the jurisdiction of the Court pursuant to article 23". Some clarification is requested. The commentary at paragraph 1 refers to States initiating complaints in respect of offences at customary international law or municipal law. It may be that this is intended to pick up the provisions of draft article 26. However, draft article 26 confers jurisdiction only in very limited circumstances and does not in general confer jurisdiction over offences at customary international law or municipal law where these are not also treaty offences.

Draft article 29 could also perhaps be more specific in relation to the types of supporting documents required to accompany a complaint.

Draft article 30. Investigation and preparation of the indictment

Importantly, draft article 30.1 provides for the review by the bureau of the court of the prosecutor's decision not to proceed with a complaint. This reflects Australia's view expressed at paragraph 64 of its written comments on the 1992 Working Group report that there should be scope for review of a prosecutor's decision not to prosecute.

Draft article 31. Commencement of prosecution

Draft article 31.1 provides that "upon a determination that there is a sufficient basis to proceed" the Prosecutor shall prepare an indictment. There is no mention of the prosecutor being satisfied that a "prima facie case" exists before preparing an indictment, although this is the standard mentioned in draft article 32 in relation to the court affirming an indictment. The meaning of "sufficient basis" should therefore be explored and, if different from "prima facie case", reasons should be supplied.

Draft article 33. Notification of the indictment

Draft article 33 sets down the requirements for notification of an indictment to States parties and States which are not party to the statute. It permits the court to seek the cooperation of the latter in the arrest and detention of accused persons within their jurisdiction. Given the consensual nature of the court's jurisdiction, no greater obligation can be placed on States which are not parties to the statute.

Draft article 35. Pre-trial detention or release on bail

Draft article 35 allows the court to detain an accused in custody or to release him or her on bail. The provision, however, does not set out the criteria the court is to use in making this decision. This should be further explored.

PART 4: THE TRIAL

Unlike the statute of the international tribunal for crimes in the former Yugoslavia, the draft statute makes general provision for rules of procedure and evidence.

Draft article 36. Place of trial

Draft article 36.1 provides for trials to be carried out at the seat of the tribunal, unless the court decides otherwise. Draft article 36.2 provides for the court and a State, which need not have accepted the jurisdiction of the court or even be a party to the statute, to reach an arrangement for the exercise by the court of its jurisdiction in the territory of the State. A State party, therefore, is not obliged to permit the court to exercise jurisdiction in its territory. This approach is preferable to that taken in relation to the international tribunal for crimes in the former Yugoslavia, which apparently allows the tribunal to sit in States without having to secure the agreement of the State concerned (see para. 6 of Security Council resolution 827 (1993)).

Draft article 38. Disputes as to jurisdiction

The commentary to this draft article states two questions on which the Working Group has invited comments. The first relates to whether all States parties or only those with a direct interest in a case should have the right to challenge the court's jurisdiction. Australia believes that only those States with a direct interest in a case should be able to challenge the court's jurisdiction. There is no benefit in a policy sense to be gained from allowing a challenge by all States parties.

The second question is whether pre-trial challenges by the accused as to jurisdiction and/or the sufficiency of the indictment should be included in the statute. Australia considers that challenges of this nature should be part of the trial process and should take place at the outset of the trial. In this regard, Australia does not agree with the provisions of draft article 38.2 (b).

The meaning of the second sentence in draft article 38.3 is unclear. Once a decision has been made as to jurisdiction it should not be subject to further challenge during the hearing, irrespective of the identity of the party challenging the jurisdiction. Accordingly, the accused person should not be able to reopen the question of jurisdiction later in the trial once it has been adjudicated upon. Of course, jurisdiction may be challenged on appeal.

Draft article 41. Principle of legality (nullum crimen sine lege)

Draft article 41 embodies the principle of nullum crimen sine lege. This meets the requirement of article 15 of the International Covenant on Civil and Political Rights which states, inter alia, that:

> "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed."

The words contained in square brackets in subparagraph (a) should be retained without the brackets to make it clear that a given treaty provision must have been made applicable to the accused by whatever mechanisms different States may adopt.

Draft article 44. Rights of the accused

Draft article 44 (1) (h) appears to allow for the trial of a person in absentia. The Working Group has sought comment on this point. Australia is, as a general principle, opposed to trials in absentia and would prefer that the statute not allow for them. On this matter we refer to article 14.3 (d) of the International Covenant on Civil and Political Rights which provides than an accused person is entitled to be tried in his or her presence.

We note further that the present draft does not contain any procedural safeguards in the event that trials may be held in absentia. These issues need to be canvassed.

Draft article 45. Double jeopardy (non bis in idem)

Draft article 45.2 (a) would allow the court to try a person who has been convicted by another court where the act in question "was characterized as an ordinary crime". The issue arises as to whether the principle of non bis in idem is being adhered to when the court can try a person again who has been properly tried by a national court solely on the ground that the offence concerned was characterized as an ordinary crime.

Draft article 47. Powers of the Court

Draft article 47.1 (a) empowers the Court to "require the attendance and testimony of witnesses". As drafted, the attendance of witnesses from any State party may be required, even if that State party is not otherwise involved in the action. The point should be made that, if adopted, this procedure would differ substantially from that usually followed where States may request assistance from other States in seeking the presence of witnesses, but where such presence is not compulsory.

The statute does not at present address the more mundane issues connected with this power, such as who is responsible for expenses of witnesses. Presumably these will be addressed, perhaps in the rules of court that will no doubt be developed.

Draft article 51. Judgement

Draft article 51.2 provides that only a single judgement or opinion is to be issued. The prohibition on dissenting judgements is easier to accept in the context of a trial than it is in the determination of appeals (see comment on draft article 56 below).

Draft article 53. Applicable penalties

As currently drafted, draft article 53.3 provides for the court to make orders relating to the proceeds of a crime but does not provide a mechanism for enforceability. That mechanism seems to be provided by draft article 65 which requires States parties to recognize and give effect to judgements of the court. These two provisions thus need to be read together.

PART 5: APPEAL AND REVIEW

Draft article 55. Appeal against judgement or sentence

As currently drafted, this article provides for the accused to have the right of appeal with the right of the prosecutor to appeal inserted in square brackets. Provision should be made for the prosecutor to appeal the decision of a trial chamber to ensure that the acquittal of an accused is not legally flawed or based on errors of fact. This accords with national procedures the world over.

Draft article 56. Proceedings on appeal

Draft article 56 dealing with proceedings on appeal does not expressly provide for dissenting or separate opinions to the decision of the appeals chamber. Although views on this point will vary according to the legal traditions of the commentator, Australia's common-law heritage would dispose it to support provision for dissenting opinions.

The commentary on draft article 56 also reveals a difference of views in the Working Group as to whether there should be a separate and distinct appeals chamber akin to the one established by article 11 of the Statute of the international tribunal for crimes in the former Yugoslavia. A separate appeals chamber may be preferable, but the final position will no doubt be determined by the number of judges constituting the court and the expected caseload.

PART 6: INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE

Draft article 58. International cooperation and judicial assistance

Draft article 58.1 places a general obligation on all States parties, whether or not they have accepted the court's jurisdiction, to cooperate with the tribunal "in connection with criminal investigations relating to, and proceedings brought in respect of, crimes within the Court's jurisdiction".

Draft article 58.2 places more onerous obligations on those States parties which have accepted the jurisdiction of the court, including the surrender of an accused to the tribunal in accordance with draft article 63. The Working Group might consider a more detailed list of the types of assistance a State party can be called on to provide under draft article 58.2. At the same time some guidance might be given as to what constitutes cooperation under draft article 58.1.

Draft article 61. Communications and contents of documentation

Draft article 61 deals with communications and contents of documentation and is based on article 5 of the United Nations Model Treaty on Mutual Assistance in Criminal Matters. The Working Group's use of articles from the United Nations model mutual assistance and extradition treaties as precedents for provisions in the draft statute is supported.

Draft article 63. Surrender of an accused person to the tribunal

Draft article 63.3 obliges States parties which have accepted the court's jurisdiction to surrender the accused person to the tribunal. This may be seen as cutting across generally accepted rules of extradition law where States retain the discretion not to extradite the person subject to the request. However, as regards the tribunal it may be argued that, by specifically consenting to jurisdiction, States have already agreed to the tribunal hearing the case and have given up the right not to hand over the accused person. The situation may therefore be distinguished from mere requests for extradition where no prior consent has been given to the exercise of jurisdiction by the courts of a foreign country and where, accordingly, it is entirely appropriate that the requested State retains the discretion not to extradite.

Draft article 64. Rule of speciality

Draft article 64 establishes the rule of speciality. This rule is a key provision in extradition treaties and its inclusion in the draft statute is essential.

PART 7: ENFORCEMENT OF SENTENCES

Draft article 66. Enforcement of sentences

Draft article 66.1 requests States parties to offer facilities for imprisonment. This approach is acceptable. States should not be forced to accept prisoners. The housing of prisoners can present particular difficulties for countries, such as Australia, which have a federal system in which each of the individual state governments run prisons and there are no federal prisons.

BELARUS

[Original: Russian]

[18 February 1994]

The competent bodies of the Republic of Belarus (Ministry of Justice and other departments), further to their observations on the question of an international criminal jurisdiction (1992), submit the following comments on the report of the Working Group on a draft statute for an international criminal court.

Belarus notes with satisfaction the results achieved by the Working Group in 1993 and points out that the idea of an international criminal court, as set forth in the report, has become much more clearly defined. Positive trends can be identified in the process of creating the proposed body and organizing its work. While many of these trends are deserving of support, some are in need of correction and further discussion.

1. As to the establishment and composition of the court (part 1 of the draft statute), it is necessary to pause to consider the question of the relationship between the court and the United Nations. As pointed out earlier in our observations on the Working Group's 1992 report (see A/CN.4/452/Add.1), close interaction between the international criminal court and the United Nations is a precondition for the court's effectiveness. In view of the fact that the basic channel for that interaction will be between the court and the United Nations Security Council (the appropriate changes being made in the character of the court), the interaction between the United Nations and the International Atomic Energy Agency (IAEA) could serve as a model for the relationship. This presupposes that the court will have close ties to the United Nations, without being a United Nations organ.

2. Extremely important questions are being raised with respect to the jurisdiction of the established body. A welcome development in that connection is the inclusion of alternative B in article 23 of the draft statute of the court, for it most closely approximates the proposed merging of two juridical acts: becoming a party to the statute and recognizing the court's jurisdiction. In this way, a State, by becoming a party to the statute, will automatically confer jurisdiction on the court, over the crimes listed in article 22. Obviously, as a first step, it will be necessary to grant States the right to exclude some crimes from such jurisdiction - once again, immediately on becoming parties to the statute. However, we are firmly convinced that such a right should not be unrestricted. In addition to the above-mentioned right, it will be necessary initially to reinforce the statute by including a limited number of the most serious and generally recognized international crimes, in respect of which it will be impossible for a State to reject the court's jurisdiction and still become a party to the statute. This will make it possible to create immediately a certain sphere of concurrent jurisdiction in relation to all States parties to the statute, and to expand that jurisdiction gradually over time.

Exclusive jurisdiction might be established over that limited number of crimes, since such jurisdiction derives logically from the nature of international crimes. In addition, the statute could leave room for a sphere of exclusive jurisdiction of the court for individual States, through declarations or agreements with the court.

In connection with paragraph 2 (a) of article 26 of the draft statute, it is worth noting that a certain limited number of crimes under general international law (aggression and genocide, in the case of States not parties to the Convention on the Prevention and Punishment of the Crime of Genocide), where they fall within the sphere of exclusive jurisdiction of the court, will not require special consent in accordance with paragraph 1 of that article. This presupposes that definitions of such crimes will be present in the statute itself or in the protocols thereto.

As envisaged, with respect to the crimes specified in paragraph 2 (a) of article 26, special consent to jurisdiction is required from the same States which are referred to in article 24, the only difference in this case being that the basis for the jurisdiction derives not from a norm of an international treaty, but rather from a norm of international law which has been accepted and recognized by the international community of States as a whole. Accordingly, the provision in paragraph 3 (a) of article 26 needs to be reformulated.

Attention should also be given to the fact that the inclusion of the contents of paragraph 2 (a) of article 26 in article 25, which is discussed in paragraph (4) of the commentary to article 26, would lead to a change in the meaning of the current paragraph 2 (a). It is hardly worthwhile to make the referral of a case relating to crimes under general international law other than aggression contingent on a decision of the Security Council.

3. In connection with the determination of the jurisdiction of the court ratione materiae, a question is often raised about the relationship between the existing regime of universal jurisdiction under international treaties in force and the international jurisdiction that is being created. There is no doubt that it is possible to replace the first regime with the second (or to alter the first regime) in relations between States parties to the statute (cf. article 30, paragraph 4, of the Vienna Convention on the Law of Treaties of 1969). However, questions may be raised regarding States not parties to the statute that are parties to such treaties and have jurisdiction over an international crime that is subject to the jurisdiction of the court. In the draft statute, the proposed solution to this problem is based on the theory of "concessional jurisdiction". This theory, although very interesting, is hardly applicable to international crimes.

International crimes form a separate category in international law on the basis of general agreement among all members of the international community, and jurisdiction in respect of such crimes always derives from a treaty. It is specifically from an international treaty that the jurisdiction of an individual State, with regard to acts recognized by it as international crimes, derives; and it is from a treaty that the jurisdiction of the court will derive as well. However, in respect of international crimes the jurisdiction of an international body would be more in keeping with the nature of such crimes than the

jurisdiction of any individual State. For that reason, it is justifiable to give priority to the statute over other international treaties.

In any case, bringing a suspect before the international court, despite a request for extradition by a State that is not a party to the statute but a party to the relevant treaty, could not be considered a violation of the treaty-law principle of "try or extradite". The obligation "to try" should not be understood in a literal sense. Its purpose is to ensure that offenders are brought to justice and prosecuted effectively. This obligation will be met if they are handed over to the court in accordance with all procedures for the protection of their right to due process.

4. The procedures for initiating prosecution by the court, as set forth in article 29 of the draft statute, are deserving of support. However, as to the authority to dismiss a case, the right to decide should belong not to the prosecutor but to the court, which should have an opportunity for subsequent review of the prosecutor's decisions. The outcome of such extremely serious cases as will be before the court should never be allowed to rest on the decisions of one man.

5. In regard to the initiation of investigations, we would like to repeat once again the proposal to conduct investigations through an independent body instead of through the prosecutor's office. Accordingly, the functions of the prosecutor's office would be curtailed and his staff reduced. As envisaged, this proposal (which represents a third alternative to the proposal made in the Commission to establish an investigative panel of judges (report of the Special Rapporteur), and to the assignment of investigative functions to the prosecutor's office) is the most acceptable solution. If this proposal is adopted, article 30 will have to be divided into two parts: one part entitled "Investigation" and the other entitled "Preparation of the indictment". The structure of the new body will also have to be altered.

6. In the light of the foregoing, it is essential that paragraph 2 of article 32 should provide a mechanism by which the prosecutor would be able to submit to the bureau for examination (or to the indictment chamber referred to in paragraph (6) of the commentary) not only the indictment, but also a report, if the evidence in the case justified dismissal.

7. In connection with article 38 of the draft statute, it seems necessary to enhance the right of all States having jurisdiction over a specific crime to challenge the jurisdiction of the court. It would be logical to link closely the category of States having the right to initiate proceedings before the court and the category of States having the right to challenge the jurisdiction of the court.

It seems acceptable that the accused should be guaranteed an opportunity under the draft statute to bring preliminary challenges to the jurisdiction of the court. By all appearances, the establishment of a special indictment chamber, which would also be able to investigate the basis for an indictment or the report of the prosecutor requesting dismissal of a case, is an appropriate measure.

8. Objections may be raised to the inclusion of the words in square brackets in subparagraph (a) of article 41. Here, it is necessary to start from the premise that, in the case of international crimes, individual criminal responsibility stems directly from norms of international law.

9. With regard to the establishment of a system of appeal against judgement or sentence (article 55 of the draft statute), the granting of the right of appeal to the prosecutor as well as to the convicted person might merit support, since that would be consistent with the functions of indictment and with the appeals procedure in criminal proceedings. In order for the appeals process to take into account the particular features of the court, it would be useful to have appeals considered by the full court, with the exception of judges who participated in the decisions at first instance.

Likewise, provision should be made for the right of the convicted person (and also the prosecutor) to petition for revision of a decision of the court (article 57 of the draft statute).

10. Furthermore, with regard to earlier comments concerning the jurisdiction of the court ratione materiae, the provision in paragraph 4 of article 63 of the draft statute merits support. In addition to that provision, it would be useful to specify more precisely the priority status of requests for the surrender of an accused person. This could be accomplished by deleting the phrase "as far as possible" from paragraph 5. In any case, the rule regarding priority should be applied unconditionally in cases involving the surrender of persons accused of crimes within the sphere of exclusive jurisdiction of the court.

It would be desirable to resolve in article 63 the question of the failure to surrender an accused person to the court, in violation of the provisions of the statute. In such situations, the court should be granted the right to request the United Nations Security Council to obtain the surrender of the accused person.

11. There is a need to define how the rule of specialty (article 64) would apply, depending on the crimes involved; for crimes falling under the exclusive jurisdiction of the court, it would not be necessary to apply this rule.

12. As presented, the provision of paragraph 4 of article 67 would prevent effective monitoring of the execution of sentences. The settlement of all questions relating to pardon, parole and/or commutation of sentences should be performed exclusively by the court itself.

The Republic of Belarus hopes that these comments will help the International Law Commission to complete its work on the draft statute for an international criminal court. The Republic of Belarus reserves the right to state its position on the draft statute ultimately prepared by the Commission.

CUBA

[Original: Spanish]

[7 February 1994]

In the opinion of the Government of the Republic of Cuba, the essential conditions do not yet exist for the establishment of an international criminal jurisdiction that would fulfil its objectives without, by its actions, adversely affecting the principle of sovereignty, which constitutes a basic premise for the existence of the United Nations.

With regard to the draft submitted to the Assembly by the Working Group of the International Law Commission, my Government is of the view that the proposed statute could be adopted only if it is presented in the form of a treaty to which the countries concerned could accede if they so wished; such a treaty should contain the requisite reservation clauses in respect of crimes which the parties do not wish to refer to an international jurisdiction.

Regarding the nature of the court to be established, my Government is of the view that, if established, the court should be a permanent body, although it should sit only when required, to consider a case. Recourse to ad hoc courts established to deal with situations already in existence would pose the risk that such courts might be influenced by the said situations, which would militate against their objectivity and impartiality.

If the said court is eventually established, the magistrates who constitute it should be elected on the basis of equitable geographical distribution. Furthermore, it should be borne in mind that the various legal systems should be represented on the court, so as to give it greater universality.

With regard to the jurisdiction to be conferred on the court, it should basically cover the list of crimes contained in the draft Code of Crimes against the Peace and Security of Mankind, as it was in the context of the draft Code, and with a view to its elaboration, that the decision to consider the possibility of establishing the said court was taken.

As to the rights of defendants before this international court, we believe that they should be afforded all the guarantees of an objective and impartial trial. In this connection, it should be clearly established that such persons cannot be tried in their absence, unless it is fully proved that such absence reflects the intention to evade justice.

For my Government, the question of the category of parties which can submit cases to the proposed criminal court is of special interest. The Cuban Government believes that to confer on the Security Council the power to refer cases to the court would constitute an extension of the functions entrusted to the Council under the Charter of the United Nations and, accordingly, a violation of the Charter. The Security Council should not assume functions which would make it equivalent to the prosecutor's office, especially if we consider that we would be dealing with charges not against States, but against individuals, whose conduct, however reprehensible and deserving of punishment, cannot endanger the peace and security of mankind.

Moreover, the possibility that the Security Council could submit cases to the international criminal court would conflict with the right of the country concerned to decide for itself whether it should submit a case to a national or an international jurisdiction; that, in turn, would undermine the voluntary nature of the court, which would be ensured through its establishment by means of a treaty. Accordingly, this would adversely affect the principle of sovereignty.

The Government of the Republic of Cuba trusts that, in re-examining the topic, the International Law Commission will give proper consideration to the misgivings of a large part of the international community with regard to the role that the Security Council could play under the proposal submitted by the Commission, as demonstrated during the discussion of this document in the General Assembly in 1993.

DENMARK
(See Norway)

FINLAND
(See Norway)

ICELAND
(See Norway)

NORWAY

[Original: English]

[15 February 1994]

As expressed in the Nordic statement on this item in the debate of the Sixth Committee of the General Assembly [26th meeting, held on 3 November 1993], the International Law Commission should be commended for its preparatory work of this draft statute for an international criminal tribunal. The establishment of an international criminal tribunal is a project of the utmost importance to the international community. The task is difficult and sensitive, but certainly achievable. The spirit of cooperation in which States have discussed the issue recently is encouraging.

In the following, the Nordic countries present their comments on the draft articles, as well as on specific questions referred to in the commentaries. As a general preliminary observation, it should be pointed out that the procedural aspects of the statute should not be left to general principles, but should be as specific as possible.

COMMENTS ON THE RESPECTIVE ARTICLES

Article 2. Relationship of the Tribunal to the United Nations

The two draft alternatives found in this article have no bearing on the tribunal's independence. The Nordic countries do have a clear preference for the tribunal as a judicial organ of the United Nations. The tribunal must be empowered with a clear United Nations mandate, in order to maintain its permanence and legitimacy. In addition, this would give the tribunal more widespread acceptance, and no separate bureaucracy with a standing committee, etc., would be needed. Among possible models that might be considered in this connection are arrangements similar to those made for the establishment of the United Nations Administrative Tribunal.

Should, however, the tribunal not become an organ of the United Nations, it is nevertheless necessary to ensure a formal linkage to the organization. One possibility might be to consider paragraph 9 of General Assembly resolution 47/111 of 16 December 1992. In that resolution, the General Assembly provided for arrangements concerning the bodies established under the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Article 5. Organs of the Tribunal

The Nordic countries wish to stress the significance of ensuring that the prosecutor be given an independent role in relation to the tribunal.

Article 8. Judicial vacancies

According to this article, judges who have been elected to fill a vacancy may sit consistently for a longer period of time (16 years) than judges who have been elected through the ordinary process. This may be considered inadvisable, and the wisdom of such a permitted service ought to be reviewed.

Article 10. Election and functions of President and Vice-Presidents

The Bureau should be primarily assigned administrative duties. Should other duties be conferred, the risk of disqualification arises. Such a system might lead to a vague distribution of power within the tribunal. It must furthermore be noted that all steps in the decision-making process of a case should be the responsibility of the pertinent chamber and never of the Bureau.

Article 11. Disqualification of judges

1. It is vital that the tribunal exemplifies a non-partisan stance in all cases, something which causes this article to be important for the totality of the rules pertaining to the tribunal. The possibility of clarifying what types of situations merit disqualification should be considered. One may here note that article 37 (4) deals with precisely this issue in regard to individuals of the same nationality.

2. There is a potential problem where the president or a vice-president faces disqualification. As a result, the requirement that such individuals take part should not be seen as necessary. The text should require only the members of the chamber, with the addition of one member from the Bureau.

3. In principle it is inadvisable to limit the right of the accused to request a competency review of a judge. It therefore follows that there ought not be a limit of the number of judges which can be requested removed on competency grounds. This is important in order to maintain a non-partisan appearance, which is essential for ensuring a continued and unassailable legitimacy for the tribunal.

Article 13. Composition, functions and powers of the procuracy

Legal safeguards require that there must also be rules of disqualification for the procuracy. In addition, there should be included a rule requiring different nationalities for both the prosecutor and deputy prosecutor.

Article 16. Privileges and immunities

1. It should be determined as to whether the service by those listed under this article should have their income taxed. As most of these positions are part-time duties, it might be argued that such immunity is not called for.

2. In paragraph 4, it is important that the deputy prosecutor be considered equal to the prosecutor in regard to privileges and immunities. This section of the article could therefore end as "other than the acting Prosecutor". As a result, the judges should not have the opportunity to revoke an acting prosecutor's immunity.

Article 17. Allowances and expenses

A determination should be made as to whether judges receiving a salary derived from other non-tribunal duties might provide a problem for their independence.

Article 19. Rules of the Tribunal

1. A framework for rules of evidence and procedure should be found within this statute, i.e., basic rules of evidence and procedure. Such a framework would thus be complied with in the more detailed rules which the tribunal will adopt after its establishment.

2. The suggestion that the various chambers should have the possibility of developing rules of procedure is acceptable, provided such rules have not been otherwise adopted by the tribunal/chambers. One must here stress that requisite uniformity of rules amongst the chambers be maintained.

Jurisdiction in general

Reliance on State consent during the various stages of procedure does not create unnecessary obstacles for bringing to justice persons having committed crimes covered by the statute. The Nordic countries have some hesitation about the rather complicated system of strands of jurisdiction and various categories of crimes set forth in articles 23 to 26. This type of system has the potential of leading to procedural difficulties. Furthermore, it is vital that the statute avoid any possibility of jurisdiction shopping by States.

Of the two proposed "strands" of jurisdiction, the Nordic countries are critical of the second strand (articles 26-27), which it is suggested should be deleted. Article 26 is particularly vague. In addition, one suggests that a clarified presentation of the complex rules be found in the first strand (articles 22-24).

Should the above suggestion be adopted, it might be advisable prior to article 22 to add the following (i.e., article 21 bis): "The Court has jurisdiction under this Statute in respect of crimes referred to in article 22, provided that its jurisdiction has been accepted in accordance with the provisions in articles 23-24." As a result, article 24 might thereby need to be slightly amended.

Article 22. List of crimes defined by treaties

1. Giving priority to treaty rules which are as far as possible part of international customary law serves the purpose of predictability and assessing individual responsibility for serious crimes, thereby preventing ambiguity. The Nordic countries are therefore gratified to see the enumeration of the serious crimes in this article, as these States continue to maintain the view that the tribunal should be limited to serious crimes against mankind.

2. It may be advisable that certain rules are drafted more specifically, and that jurisdiction is limited to acts of particular gravity. Hence, the jurisdiction drafted in this article may be unnecessarily broad. Not all of the crimes referred to have the degree of seriousness which should be deemed mandatory. In addition, one should determine whether the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) should also be listed.

3. The statute of the International Tribunal for the former Yugoslavia appears to be more adequately formulated, with reference to its articles 2 through 5.

Article 23. Acceptance by States of jurisdiction over crimes listed in article 22

1. Alternative B is preferred by the Nordic countries. This alternative provides for a presumption of jurisdiction, with the possibility of an opting-out declaration by a party that should wish to exclude the tribunal's jurisdiction in some respects. The other alternative might lead the tribunal into ending up with a very narrow scope of jurisdiction, based upon individual declarations of each party, thereby weakening the statute's general aim.

2. A State that intends to become a party to the statute under article 23 should be required to accept some minimum basis of jurisdiction, e.g., jurisdiction under article 22 (a) and (b).

Article 24. Jurisdiction of the Court in relation to article 22

1. This article requires that also the State in which the accused is present accepts the jurisdiction of the tribunal, however the related article for the International Tribunal for the former Yugoslavia appears to be more adequately drafted. Further consensual requirements than those already in the article should not be appended.

2. Paragraph 1 (b) is formulated in an unnecessarily complex way. An interpretation of this section might be that the tribunal has jurisdiction in regard to genocide once a State party to the Genocide Convention has consented. It is important that this paragraph correlates with the drafting comments.

3. The limitation in paragraph 2 may not be necessary. It might be sufficient that the territorial State is party to the statute.

Article 25. Cases referred to the Court by the Security Council

Though articles 25 and 27 provide a rather large and undefined political discretion when the Security Council intends to bring cases before the court, the Nordic countries support the role which might be played by the Security Council according to these articles, with the proviso that the Council should not refer to the tribunal specific complaints against named individuals. One must ensure that the discretion given to the Security Council does not raise questions about the court's credibility when the Council intends to bring cases before the court. The principle of legality (nullum crimen sine lege) would seem to require that the modalities and criteria through which the Security Council exercises its proposed functions under the statute be more carefully elaborated. It is however entirely appropriate that the Council be given a prerogative to refer to the tribunal particular situations and leave it to the latter to decide whether prosecution should be instigated.

Article 26. Special acceptance of jurisdiction by States in cases not covered by article 22

Should this section not be deleted, the Nordic countries have the following comments and suggestions:

1. Both of the crimes presented in article 26 are vaguely formulated.

2. Article 26 (2) (a) provides for the tribunal to judge in accordance with international legal principles not promulgated. This in itself is contrary to principles of legality, which for criminal prosecution requires written law (nullum crimen sine lege). In summation, this section is too broad from the perspective of the principle of legality in criminal law, and should therefore be deleted.

3. The Nordic countries are sceptical with regard to the regulation of narcotics crimes through this statute, despite full concurrence with the general conviction that action against international narcotics-related crimes requires international cooperation on the basis of agreements. It is difficult to perceive this tribunal as constituting the appropriate forum for cases of this nature. It must further be noted that the mere fact that a crime occurs over international boundaries cannot be considered sufficient basis in making this tribunal the appropriate legal forum.

Article 28. Applicable law

In order to maintain consistency it should be expressly stated that previous decisions of the tribunal are also considered a source of law. In subparagraph (c), national legislation may also be needed as a primary source, not merely a secondary source. This may be necessary, as the relevant treaties do not all provide applicable punishment. For instance, article 26 (2) (b) is already based on national legislation.

Article 29. Complaint

The provision of free access to deposit a complaint would arguably be functionally counter-productive. However, in addition to States being given the right to file complaints, the prosecutor should be given the right to commence investigation prior to the filing of complaints. A determination should also be made as to whether proceedings might also be instituted on the basis of information provided by internationally recognized humanitarian organizations.

Article 30. Investigation and preparation of the indictment

1. As stated previously, the Bureau should have primarily administrative duties. Providing the Bureau with the power to review a prosecutorial decision is difficult to accept, as it may be problematic in maintaining the impression of non-partisanship. Such a construction is not combinable with the independence of the prosecutor, nor with the principle of maintaining the separation of the roles of the tribunal and the prosecutor.

2. Review may be done differently, perhaps by review of one of the tribunal's chambers. It must be noted that the chamber in question would thereafter not be deciding the case.

Article 31. Commencement of prosecution

After certain periods of time a review should be made determining as to whether continued custody is required. The practice of the European Court of Human Rights might provide useful guidance in this connection.

Article 32. The indictment

1. It is once again important to stress that the Bureau should primarily have administrative duties. First, it is unacceptable that the tribunal's three leading judges should decide the validity of the indictment yet also try the case; and secondly, it is unacceptable that the Bureau has anything to do with

the issuance of orders and warrants. In summation, the Bureau should not be any type of "indictment chamber".

2. The Nordic countries strongly suggest that article 32 be deleted. Should however this article be retained, it must be clarified what occurs when a prima facie case is not found. Is the suspect thereby found not guilty; is the case dismissed; or are further investigations automatically commenced?

Article 35. Pre-trial detention or release on bail

The use of the concept of bail is unacceptable for the Nordic countries. It is furthermore against the legal traditions of many other countries, and should therefore not be included. Such procuring of the release of a charged individual is a procedure which most likely would not be realistic for this tribunal, considering the magnitude of the crimes in question.

Article 37. Establishment of chambers

1. The tribunal's chambers should be established prior to the adoption of rules of procedure, as was indeed done by the International Tribunal for the former Yugoslavia. There should be a structured rotation system for the judges, rather than having the Bureau determine which cases should be decided by the various judges. Reference can here be made to the process applied in connection with the establishment of the International Tribunal for the former Yugoslavia. Finally, it is self-evident that a random distribution of cases must be ensured.

2. Should the above suggestion be pursued, it would be natural that paragraph 4 be transferred to article 11, as that article concerns disqualification.

Article 38. Disputes as to jurisdiction

All member countries should have come control over the tribunal's competence, not solely countries with a legal interest in the case concerned. This should also be possible prior to the main hearing. In addition, any further determination of sufficiency of indictment should not be necessary.

Article 40. Fair trial

It is essential that trials be held in public. Use of closed sessions must be better defined and more clearly regulated. Reference may here be made to the International Covenant on Civil and Political Rights (1966), article 14 (1).

Article 41. Principle of legality (nullum crimen sine lege)

1. The fact that a treaty has entered into force is considered sufficient in maintaining legality. This view is based on the following two issues: first, the various countries will have fulfilled their obligations relating to a treaty at different times; and secondly, a requirement of incorporation or transformation would debilitate the tribunal's legal basis. The various conventions should serve the purpose of providing a description of the offence.

A "written law" or catalogue of prohibited actions will thus be found within the conventions.

2. Should article 26 be deleted, it is logical that likewise should occur with this article's subparagraphs (b) and (c).

Articles 42/43. Equality before the Tribunal/Presumption of innocence

Though these articles present the two important principles of equality before the law and innocence of the defendant before proved guilty, one should here determine as to whether it ought to be expressly stated that the defendant has the benefit of the doubt.

Article 44. Rights of the accused

1. Considering the matter of legal safeguards, the Nordic countries have some hesitation regarding the provision of trial in absentia. Such trials could give rise to political as well as legal difficulties which ought to be avoided, thereby precluding any judgement in such a situation.

2. Should it nevertheless be determined that trial in absentia is essential, it must be noted that such trials should only occur in a very limited manner, on the condition that they be regulated more clearly than is currently worded in the draft statute.

3. In regard to paragraph (w) of the commentary to the draft article, one may question the rationale of having a trial whatsoever, should a person convicted in absentia in fact be given merely a temporary judgement.

Article 46. Protection of the accused, victims and witnesses

Within this article should be included rules regarding the protection and assistance of victims of the crimes, in accordance with certain basic principles set forth in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (General Assembly resolution 40/34 (1985)).

Article 48. Evidence

1. There should be more specific evidentiary rules. Such principles as best evidence and free assessment of evidence should be mentioned at the beginning of this article.

2. There should not be access to appeal decisions regarding evidence from the main hearing. This would cause a division of the proceedings and could also be utilized by the parties as a postponing tactic. If the parties are dissatisfied with a decision of the tribunal in this regard, they may refer to article 55 (1) (a).

Article 51. Judgement

Dissents are an expressive outlet for legal views in many legal systems, and should therefore be permitted. Such views would not have any negative effect on the tribunal's standing or authority. One may here refer to the European Court of Human Rights, which permits dissents.

Article 53. Applicable penalties

1. The tribunal should be exclusively a criminal tribunal. Consequently, the application of civil law-related penalties should be reconsidered, as it is highly doubtful as to whether such rules should be included. To illustrate, a potential case resulting in a judgement for damages presents a difficult choice of law issues. In addition, there is the question of how such a judgement is to be executed, something which is unclear.

2. It might be advisable to delete the possibility of judgement of fines. Considering the magnitude of the crimes in question, it is difficult to imagine how fines would be applicable. Furthermore, it should be noted here that the penalty of confiscation/seizure is a punishment for criminal activity which should be included in the statute, as it is in fact related to criminal punishment. This should be possible in order to provide a compensating remedy for victims of certain crimes, i.e., victims of stolen property, etc.

3. The Nordic countries are pleased that the provisions regarding punishment do not include the death penalty.

Article 54. Aggravating or mitigating factors

The possibility that such issues as necessity, self-defence, intent, etc., be added to this article ought to be considered, and a determination should be made as to whether or not such inclusion in this statute would present a basis for antithetical conclusions. One must determine whether material rules should be coupled with procedural rules in such a statute or whether the former should be found in a "Code of Crimes".

Article 55. Appeal against judgement or sentence

The decisions of the tribunal should also be appealable by the prosecution. Reference should here be made to article 31.

Article 56. Proceedings on appeal

1. It is important that the tribunal's chambers be established from the outset, and that the composition of the chambers not be chosen by the Bureau. A rotation plan determining which judges should decide appeals is advisable. Considering the likely limited number of cases the tribunal will review, one ought to look into the necessity of a separate appeals tribunal.

2. The wording of the statute can possibly be interpreted that with six judges and a split-vote determination of 3-3, the court of the first instance's decision would stand. Majority vote ought to be required for any decision

against the defendant. A split vote would thus negate the guilt of the defendant, thereby observing the principle that all doubt shall be to the benefit of the defendant.

Article 57. Revision

To have the possibility of requesting a re-examination or careful review for correction or improvement of a judgement is important in most legal systems. The prosecutor should also have the possibility of applying for revision of the tribunal's judgement.

Article 61. Communications and contents of documentation

It is possible that usage of the word "normally" in paragraph 1 might not be necessary, and a determination should be made on that issue. It is also important to clarify that in paragraph 2, the word "communications" must be written documentation.

Article 63. Surrender of an accused person to the tribunal

An indictment should only be sought from a constituted chamber. Thus, reference to the Bureau should be deleted.

Article 66. Enforcement of sentences

1. The possibility of serving time in the country where the violation was perpetrated merits further careful consideration.

2. Should fines be maintained as a penalty in the final draft, it is important that the statute contains rules regarding the execution of such a judgement, and where such funds should be distributed. In addition, it is necessary to have rules for confiscation/seizure and claims of vindication.

SPAIN

[Original: Spanish]

[25 January 1994]

The Government of Spain firmly supports the establishment of an international criminal tribunal with general competence to punish international crimes. The existence of such a tribunal is an increasingly felt ethical and political need in the international community.

In response to the General Assembly's invitation (resolution 48/31), the Government of Spain wishes to submit the following comments and observations on the draft articles of the statute for an international criminal court which have been prepared by the International Law Commission.

1. With regard to the relationship of the tribunal to the United Nations, there is no doubt that a close link between the tribunal and the United Nations

is necessary for both practical reasons and reasons of moral authority. It would therefore be best for the statute to be adopted by an international conference convened under the auspices of the United Nations. Moreover, in order to properly establish the relationship between the tribunal and the United Nations system, appropriate references must be made to the latter system in the preambular and operative parts of the statute of the court. All of this should be without prejudice to the possible adoption of a treaty of cooperation formalizing and even reinforcing the link between the United Nations and the international criminal tribunal.

Another question closely related to the previous one concerns the number of ratifications of or accessions to the proposed treaty for the establishment of the tribunal which would be necessary for the statute to enter into force. The Government of Spain is of the view that this number should be neither too low, since this would deprive the tribunal of its necessary representativeness, nor too high, so as not to unduly delay the start of its functioning.

2. Articles 22, 23 and 24 of the draft statute provide that the court's jurisdiction shall be voluntary and not binding. Binding jurisdiction would no doubt be ideal; however, until such time as this becomes feasible, the Government of Spain considers the system contemplated in the draft articles to be perfectly acceptable.

Given the importance of this question, it might be worth while to look a little more closely at the following articles:

- In the absence of an international code of crimes, article 22 appears to be acceptable, especially when viewed against article 21, which provides for the revision of the list of crimes;

- Of the three alternatives presented in article 23, Spain is in favour of alternative B, which provides for the voluntary nature of the court's jurisdiction without emphasizing it too strongly;

- Article 25 is acceptable on the understanding that it would be directed more towards the denunciation of general situations than against individuals, and would perhaps provide a good alternative to the establishment of tribunals ad hoc;

- On the other hand, article 27 needs to be examined more fully, since its current wording not only contradicts in some measure the circumscription of the tribunal's jurisdiction ratione materiae to natural persons, but also causes some degree of confusion with regard to the crime of aggression.

3. The Government of Spain considers that as far as trials in absentia are concerned, article 44 adopts a balanced approach to the arguments for and against the inclusion of a provision on such trials, by excluding in principle such a possibility while allowing it, on an exceptional basis, in cases in which the court, after hearing the submissions and considering the necessary evidence, determines that the absence of the accused was deliberate.

In such a case, and in order to guarantee the full protection of the rights of the accused, provision should be made for a new trial if the accused appears before the court at a later stage.

4. The Government of Spain has certain misgivings with regard to paragraph 2 of article 53, concerning applicable penalties, since the provision does not seem to fully respect the principle of the legality of penalties ("nulla poena sine lege"). In order to comply with the provisions of article 15, paragraph 1, of the International Covenant on Civil and Political Rights ("Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed"), provision must be made for the court to have, when deciding upon the length of a term of imprisonment or the amount of a fine, the duty - and not merely the ability - to take into account the penalties provided for in the national law of the States referred to in subparagraphs (a), (b) and (c) of article 53 (2).

5. With respect to recourses, the Government of Spain holds the view that provision should be made for recourse by appeal and revision.

In addition to the convicted person, the prosecutor should also be empowered to appeal against a decision or to apply for revision of a judgement. It will therefore be necessary to remove the square brackets in articles 55 and 57.

SWEDEN

(See Norway)

COMMENTS RECEIVED FROM NON-MEMBER STATES

SWITZERLAND

[Original: French]

[8 February 1994]

The International Law Commission, its Special Rapporteur, Mr. Doudou Thiam, and the Working Group are to be congratulated for having adapted so rapidly to the constantly changing requirements of the international situation and preparing, in such a short period of time, the draft statute for an international criminal court, on which we wish to offer the following comments. It is true that the task of the Working Group and of the Commission has been facilitated to some extent by the excellent report of the Secretary-General of the United Nations concerning the establishment of an ad hoc International Tribunal for crimes committed in the former Yugoslavia (document S/25704 of 3 May 1993).

It is clear, none the less, that the establishment of a permanent international criminal jurisdiction poses problems that are even more difficult than the creation of a Tribunal whose jurisdiction is limited to crimes

committed in the former Yugoslavia. In the latter case, the Statute of the Tribunal became immediately applicable to all States Members of the United Nations on the basis of Article 25 of the Charter, since it was incorporated into resolution 827 (1993) adopted by the Security Council under Chapter VII of the Charter. It must be remembered that this exceptional approach cannot be followed in the establishment of a permanent international court, and we shall therefore be obliged to use the treaty approach. Only those States which so desire will become parties to the proposed convention. The fear is, however, that those countries whose nationals have little or nothing to be reproached for will be the ones to accede to the treaty while other States will refrain from doing so, thereby depriving the new instrument of some of its usefulness. This is merely an observation and not a criticism of the International Law Commission. Indeed, it is difficult to see what approach other than the treaty approach could be adopted.

The future international criminal court will therefore be a jurisdiction in the service of the States parties to the convention establishing it (article 4) rather than in the service of all States Members of the United Nations. This situation may be distinguished from that of the International Court of Justice, the "principal judicial organ of the United Nations" (Article 92 of the Charter), which is governed by a Statute to which all States automatically become parties upon their admission to membership in the Organization (Article 93, paragraph 1, of the Charter). This automatic quality is lacking in the proposed new criminal court, which cannot therefore become another of the "judicial organs" of the Organization, as contemplated in the text bracketed in article 2 of the draft and as suggested by a number of representatives who spoke on the matter in the Sixth Committee of the General Assembly. The Swiss Government is of the view that efforts should be aimed at another approach - that of the independence of the court, which should, nevertheless, be linked to the United Nations through a cooperation agreement.

Part 1 (articles 1 to 21) of the Commission's draft deals with the organization of the proposed international jurisdiction. The new tribunal would comprise the court, consisting of 18 members of different nationalities elected for a single term of 12 years, the procuracy, and the registry with its appropriate staff. These three organs, including the procuracy, would appear to be quite essential. Indeed, it is difficult to see how States that file complaints could themselves undertake the prosecution. The general approval thus given by the Swiss Government to part 1 of the draft articles in no way implies that it agrees with all the institutional provisions of the draft. It finds the number of judges, 18, excessive (article 5) - even the International Court of Justice must make do with 15 members - and would prefer the example of article 12 of the Statute of the International Tribunal for crimes committed in the former Yugoslavia, which provides for 11 judges (divided into two Trial Chambers with three members each, and an Appeals Chamber consisting of five judges). The review clause contained in draft article 21 would further permit the number of members of the court to be increased in accordance with the workload. The Swiss Government also finds excessive the length of the non-renewable terms of the judges, which is set at 12 years (article 7, paragraph 6), and proposes that it should be reduced to nine years.

Part 2 of the draft statute (articles 22 to 28), which is entitled "Jurisdiction and applicable law", lists those crimes over which the court may have jurisdiction and the limits of such jurisdiction. It draws a distinction between what are defined as international crimes by the treaties that provide for the suppression of such crimes (article 22) and the "undesirable conduct" that is punishable under customary international law or treaty law. Even for those crimes falling under the first category, the court does not have absolute jurisdiction; the State in question, which is identified with the aid of the criteria set out in article 24, must have accepted its jurisdiction. Article 23 offers three alternative modalities of such acceptance. The Swiss Government prefers alternative B: the presumption of acceptance of the court's jurisdiction for the international crimes listed in article 22; and the need for a unilateral declaration of acceptance for the "conduct" referred to in article 26.

Part 3 of the draft (articles 29 to 35) concerns mainly the indictment and commencement of prosecution. Possible complainants who may refer a case to the prosecutor include a State (whether or not it is a party to the proposed convention) which has jurisdiction with respect to the crime in question and which has accepted the court's jurisdiction over this type of crime, and the Security Council of the United Nations (article 25) in respect of those crimes referred to in article 22 and the "conduct" that is punishable under general international law (article 26, paragraph 2 (a)).

The precise scope of draft article 25 is unclear: this provision should either give rise to the automatic jurisdiction of the court in respect of cases brought before it by the Security Council, or retain the requirement, laid down in articles 23 and 26, for acceptance of the court's jurisdiction by the State concerned. It is essential for the draft statute or the commentaries thereto to dispel all doubts in that regard. The Swiss Government would have serious reservations about subscribing to the former interpretation if the Commission decided to retain it. In other words, it believes that the requirement of the consent of the State in question should also exist for cases that are submitted to the court by the Security Council.

Again with respect to the commencement of prosecution, it is difficult to understand why the Commission should refuse to authorize the procuracy of the tribunal to initiate an investigation on the basis of information received, even if there is the possibility that the investigation might conclude that the court has no jurisdiction to hear the case. The solution proposed in the draft articles differs from that adopted in article 18 of the Statute of the International Tribunal for the former Yugoslavia, which is preferred by the Swiss Government.

Still in part 3 of the draft articles, we also consider that the commentary to draft article 31 confers virtually unlimited discretion on the court in the matter of pre-trial detention. If it is impossible to limit the duration of detention, the Government of Switzerland believes that, at the very least, a mechanism should be established to permit the detainee to request his release on bail.

Part 4 of the draft statute (articles 36 to 54) deals with the trial. One of the first questions to be raised in this regard is the invitation addressed by the Commission to States in paragraph (6) (b) of the commentary to draft article 38 to reply to the question of whether, as in the case of States (article 38, paragraph 3), accused individuals should have the option to challenge the court's jurisdiction. Given that the objective of the draft statute is precisely to establish the international criminal responsibility of individuals, in the Swiss Government's view, there can be no reason whatsoever to deny them this option.

Draft article 53 deals with applicable penalties. We note that the scale of penalties provided in this article is extremely flexible, ranging from imprisonment for a non-specified minimum term to life imprisonment, and that it authorizes fines of "any amount". It is true that in determining penalties, the court "may have regard to" the criminal law of various States and aggravating or mitigating factors (article 54). Nevertheless, these rules seem to be too vague to do justice to the principle of nulla poena sine lege. Their clarity would be enhanced if article 53 provided that the trial chamber must (rather than "may") have regard to the penalties provided for in the national laws of the States in question.

Article 44, paragraph 1 (h), of the draft excludes the possibility of trials in absentia. According to the commentary to this provision, this possibility was excluded largely because of article 14 of the International Covenant on Civil and Political Rights, which requires the presence of the accused at the trial. The Commission has thus followed the precedent established for the International Tribunal for crimes committed in the former Yugoslavia (S/25704, para. 101), which has been denied the option of conducting trials in absentia for the same reason. This reason, however, does not appear to be decisive, at least in so far as a procedure would permit the convicted person to appeal on the grounds that he was tried in absentia. The key question is whether the power to try and to convict in absentia does not carry the risk of transforming the court into a totally ineffectual body. The Government of Switzerland believes that this is a very real danger and that article 44, paragraph 1 (h), should therefore be replaced by a provision which unconditionally prohibits trials in absentia.

Part 5 of the draft, entitled "Appeal and review" (articles 55 to 57), provides a recourse procedure for convicted individuals whose appeals are based on material errors of fact or of law, or on a manifest disproportion between the crime and the sentence (article 55). While this provision should be maintained, it nevertheless raises a further problem. International human rights instruments (article 9, paragraph 4, of the International Covenant on Civil and Political Rights; article 5, paragraph 4, of the European Convention on Human Rights; article 7, paragraph 6, of the American Convention on Human Rights) require national legislations to provide for recourse against arbitrary arrests. The draft articles should therefore authorize the introduction of an internal recourse procedure against arbitrary arrest when the aim is to bring a suspect brought before the court. The grounds on which such recourse may be based should, however, be strictly limited and largely procedural. Moreover, the time-limits for the institution of recourse proceedings should be as short as possible.

Lastly, part 6 of the draft statute deals with international cooperation and judicial assistance (articles 58 to 64). It lists important obligations in criminal matters for States parties to the statute of the future Court, particularly in the following five areas: the location of persons; the taking of testimony; the production of evidence; the arrest and surrender of the accused; and the application of interim measures (articles 58 to 63). Indeed, the cooperation thus contemplated between the national administrative and judicial authorities on the one hand and the court on the other seems to be essential in order to ensure the effective functioning of the Court. In this connection, however, the draft fails to pronounce on the surrender of nationals (cf. article 63); this silence no doubt means that such surrender may be demanded by the court. However, certain countries refuse to extradite their nationals. Would it therefore not be preferable to determine the fate of the nationals of the State concerned by applying to it the principle of aut dedere aut judicare?

The preceding comments, which are based partly on the experience gained from the establishment of the International Tribunal for crimes committed in the former Yugoslavia and partly on the problems that are currently being encountered in implementing its Statute through national legal systems, are far from being exhaustive. They should not cause us to lose sight, however, of the fact that this thoughtful and valuable draft is also very timely. It therefore has the support of the Swiss Government. It is now important not to lose momentum and to take advantage of the keen interest which both States and the general public have shown in establishing an international criminal jurisdiction of a permanent nature. In other words, we must act quickly and with determination. The Government of Switzerland sincerely hopes that the Commission will conclude its work on this topic during the course of its session in 1994.